IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.8518 OF 2003

1. Bharati Cellular Limited,
   a Company incorporated under the
   Companies Act, 1956 and having
   its Registered Office at Qutub
   Ambience, B-5/12, Meheroli Road,
   New Delhi--110 030 and having its
   office at 1st floor, Peninsula
   Chambers, G.K. Marg, Lower Parel,
   Mumbai--400 013.
2. Mr.Sunil Bharti Mittal, of New
   Delhi, Indian inhabitant,
   having his address at H-5/12
   Qutab Ambience, Mehrauli Road,
   New Delhi--110 030. : Petitioners

V/s.

1. State of Maharashtra, through
   the Secretary, Urban Development
   Department, Mantralaya,
   Mumbai--400 020.

(Notice to be served on the
Additional Government Pleader,
Appellate Side, High Court,
Mumbai).

2. Union of India, through the
Secretary, Ministry of
Communications, Government of
India, New Delhi.
(Notice to be served on the
Central Government Advocate,
having his office at Aayakar
Bhavan Annexe, 2nd floor,
New Marine Lines, Mumbai-400 020.

3. Pune Municipal Corporation,
having its head office at
Shivaji Nagar, Pune--5. : Respondents

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With

CIVIL APPLICATION NO.404 OF 2004

In

WRIT PETITION NO.8518 OF 2003

Mr.F. Devitre, Senior Counsel, with Mr.P.D.Dhonde and Ms S. Somaiya i/b.D.H. Law Associates for the petitioners.

Mr.S.R.Nargolkar, Asstt. Govt. Pleader for respondent

no.1.

Mr.M.S.Karnik with Mr.S.M.Dharap for respondent no.2.

Mrs.Kiran Bhagalia with Ms Asha Bhembwani for respondent no.3.

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CORAM : S.RADHAKRISHNAN &
S.A.BOBDE, JJ.

December 13, 2004.

ORAL JUDGEMENT (Per Bobde, J.)

1. Rule, returnable forthwith.

Mr.Nargolkar, learned Asstt. Govt. Pleader for respondent no.1, Mr.Karnik for respondent no.2 and Mrs.Bhagalia for respondent no.3 waive service.

Heard by consent.

2. By this petition, Bharati Cellular Limited and one of its Directors have challenged the notice dated 17.7.2003 and similar notices issued by respondent no.3, Pune Municipal Corporation, for the demolition of allegedly unauthorised construction of cabins for housing telephone connector equipment. The petitioners have also sought directions to respondent no.3 Corporation to restrain the Corporation from demanding premium on the aforesaid construction.

3. The petitioner no.1 holds a cellular licence in the Maharashtra Circle to provide cellular services in various cities in Maharashtra. According to the petitioners, for providing these services, they have placed telecommunication equipments from the roof-tops of various buildings in the city of Pune and various other areas in the State of Maharashtra. The petitioners have described these equipments as easily removable and not embedded in the building and state that for protection of such equipments, it is necessary to have temporary cabins on the roof-tops of various buildings.

4. The petitioners are mainly aggrieved by the fact that respondent no.3 Corporation has demanded premium for the aforesaid construction made by the petitioners and has issued notices for demolition of those constructions. As observed, the constructions in question comprise of cabins on roof-tops in which telecommunication equipment is housed. It also appears that a part of the equipment like antennae protrudes from the cabin into the sky. In some cases, apparently, these antennae are installed on towers or pipes specially constructed for the purpose. The size of the towers and the pipes on which the antennae are installed is variable.

5. Respondent no.3 Corporation claims that it is entitled to charge premium on such construction under rule 6.6.2.2 of the Development Control Rules. Rule 6.6.2.2 reads as follows:-

> "6.6.2.2 In specific cases where a clearly demonstrable hardship is caused the Commissioner may by special written permission.
>
> (i) Permit any of the dimensions/provisons prescribed by these rules to be modified provided the relaxation sought does not violate the health safety, fire safety, structural safety and public safety of the inhabitants, the buildings and the neighbourhood. However, no relaxation from the set back required from the road boundary or FSI shall be granted under any circumstances.
>
> While granting permissions under (i) conditions may be imposed on size, cost or duration of the structure, abrogation of

claim of compensation, payment of deposit and its forfeiture for non-compliance and payment of premium."

According to the Corporation, each of the towers constructed by the petitioners within the city of Pune is illegal in the sense that they are constructed without permission and they are of proportions which are not permissible under the Development Control Rules. Therefore, according to the Corporation, the only authority for permitting such construction is derivable from the aforesaid Rules which empower the Corporation to remove a clearly demonstrable hardship. According to the Corporation, the hardship arises in view of the fact that the petitioners have been permitted to hold the licence for providing cellular services which cannot be operated except by the use of equipment which is housed in the cabin and towers which protrudes from the cabins, the cabin and towers being otherwise impermissible.

6. On the other hand, according to the petitioners, the cabins and towers are clearly permissible and not chargeable to premium. The petitioners rely on regulation 15.4.2 which reads as follows:-

"In addition to rule 15.4.1.1(a), (b) and (c) and 17.7.3 the following shall not be included in covered area of FSI and built up area calculations.

a) .....

b) .....

c) .....

d) .....

e) .....

f) .....

g) .....

h) .....

i) .....

j) .....

k) .....

l) .....

m) .....

n) .....

o) Area of one room for installation of telephone concentrates as per requirement of Telephone Authority but not exceeding 20 sq. m. per building with the permission of the Commissioner."

7. The petitioners have further contended that this is a regulation which is included in the Development Control Rules by virtue of a directive of the State of Maharashtra dated 9.10.1996 to Municipal Commissioners of all Municipal Corporations in Maharashtra, except Brihanmumbai Municipal Corporation under section 154 of the Maharashtra Regional and Town Planning Act, 1966. By this directive, the State Government has directed the Corporations to initiate a proposal for modification of the M.R.T.P. Act so as to incorporate a provision in the Development Control Regulations as follows:-

> "The area of one room for installation of telephone connectors as per the requirements of the Department of Telecommunication or the companies authorised on that behalf but not exceeding 20 sqm. per building with the written permission of the Commissioner, can be permitted free of FSI.
>
> Where similar provision is already existing in the DC Regulations, the said provision can be made operative to the companies to

whom valid license is issued by the Department of Telecommunication."

8. The Corporation disputes that the Development Control Rules have been modified in pursuance of the directives of the Government, but it is not necessary to go into that question in view of the fact that clause (o) reproduced above in effect seems to give effect to the directive and, in any case, has the same effect.

9. The main contention of the petitioners before us is that there is no provision in the Bombay Provincial Municipal Corporation Act or the Development Control Rules which authorises the Corporation to charge a premium for a structure covered by clause (o) i.e. a cabin or a room of a size not exceeding 20 sq. mtrs. per building constructed with the permission of the Commissioner which houses telephone connectors or concentrates.

10. Having heard the parties at length and having construed the regulation in question, we are of view that there is no power in respondent no.3 Corporation to charge any premium in respect of an area of one room for installation of telephone concentrates which does not exceed 20 sq. mtrs. per building. No provision of law

has been pointed out to us which expressly authorises the charging of a premium in respect of a structure covered by clause (o). It is a settled law that where an express power to tax or charge is not conferred on a public body, it is not entitled to do so [see Municipal Corporation of Greater Bombay v. Noshir Shapurji Dhabhar (1990) 92 B.L.R. 462)]. We are, therefore, clearly of view that such cabins or rooms constructed by the petitioners within the city of Pune which do not exceed an area of 20 sq. mtrs. would not be chargeable to premium. We are fortified in this view by the specific provision conferring the power to charge premium in the other clauses of regulation 15.4.2, which is clearly absent in clause (o).

11. However, the learned counsel for the Corporation contended that the unauthorised construction made by the petitioner is not restricted to a room of the size of 20 sq. mtrs., but there are several projections or protrusions which are not permissible. The learned counsel contended that these projections either violate the height or weight norms and may also be in violation of some other norms. The Corporation, however, fairly accepted the fact that a detailed inspection of the petitioners' towers has not been carried out by the

Corporation. Mainly, according to the learned counsel, this is due to the fact that the petitioners did not apply for permission before making these constructions. It is not necessary to go into the controversy whether prior permission was obtained or not or whether the petitioners obtained a deemed permission, in the view we are taking.

12. It is clear to us that it would be wholly impermissible to allow the petitioners to make any constructions which violate the Development Control Regulations. If the construction made by the petitioners violates any regulation, then upon such fact being ascertained in the course of an inspection, we are of view that respondent no.3 Corporation will be entitled to consider the case under regulation 6.6.2.2 reproduced earlier. Indeed, the learned counsel for the petitioners fairly accepted the fact that none would have a right to make a construction which violates the Development Control Rules.

13. In these circumstances, we are of view that the demolition notices which have been issued on the basis that various constructions are illegal and liable to be demolished are not sustainable. The demolition notice dated 17.7.2003 annexed to the petition is also defective

in law in that it is issued on the basis that the cabin and the tower on the terrace of the building are wholly unauthorised. As we have indicated above, a cabin of the measurement permitted by clause (o) would be authorised. Likewise, the demolition notice is not sustainable on the ground that the petitioners have not paid premium under clause 6.6.2.2. In the view we have taken, the premium would be chargeable only if the construction is in violation of the Development Control Regulation cannot be sustained except in exercise of the power to remove a demonstrable hardship.

14. In the circumstances, we allow the petition to the extent that we hereby set aside the demolition notice and similar such notices in respect of allegedly unauthorised construction made by the petitioners for the purpose of providing cellular services. It is not disputed by the Corporation that several such notices have been issued to the petitioners in the city of Pune.

15. Respondent no.3 Corporation shall be at liberty to issue show cause notices to the petitioners in respect of the allegedly unauthorised structures. In pursuance thereof, the petitioners shall be entitled to raise all such contentions as may be advised and apply for

regularisation of its structures under clause 6.6.2.2. The Corporation shall ensure that the premium, if any, shall be charged case by case depending on whether the structure violates any of the Development Control Rules.

16. According to the learned counsel for the Corporation, the construction of the petitioners are not covered by clause (o) of the Development Control Rules in view of the note appended thereto, according to which the Regulations do not apply to constructions made prior to certain date. Resplendent no.3 Corporation shall be at liberty to consider the applications for regularisation of the structures, in accordance with law, as may be advised.

17. At this juncture, we may mention that the contention on behalf of the petitioners that in view of certain provisions of the Indian Telegraph Act, the Corporation is not entitled to charge any fee in respect of such structures. We leave this question undecided with liberty to the petitioners to press this contention as and when occasion arises.

18. The rule is made absolute in the aforesaid terms.

19. In view of the disposal of the Writ Petition, Civil

Application no.404 of 2004 does not survive and the same stands disposed of.

Sd/-

(S. RADHAKRISHNAN, J.)

Sd/-

(S.A. BOBDE, J.)